

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Trust of MAXINE E.
ZABORSKI, Deceased.

SALLY T. BAUMANN, WILLIAM R.
ZABORSKI, and JAMES A. ZABORSKI,

UNPUBLISHED
June 30, 2000

Petitioners-Appellees/Cross-
Appellants,

v

RONALD ZABORSKI,

No. 209055
Macomb Probate Court
LC No. 96-146365-TI

Respondent-Appellant/Cross-
Appellee.

Before: Markey, P.J., and Doctoroff and Murphy, JJ.

PER CURIAM.

Respondent appeals by right the probate court's order setting aside the inter vivos trust of Maxine Zaborski and several deed conveyances involving Maxine's real estate and the court's order denying respondent's motion for summary disposition on the issue regarding whether petitioners had standing to bring this lawsuit. Petitioners cross-appeal the probate court's order denying their motion to disqualify two attorneys from representing both respondent and Maxine. We affirm.

Respondent first asserts that the probate court's factual findings were clearly erroneous regarding the issue of undue influence and that the court erred in setting aside the inter vivos trust and the deed conveyances. We disagree. "Findings of fact made by a probate court sitting without a jury will not be reversed unless clearly erroneous." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). A finding is clearly erroneous when the reviewing court is left with a "definite and firm conviction that a mistake has been made." *Id.*

To establish undue influence, evidence must be presented that the grantor was subjected to threats, fraud, misrepresentation, flattery, or physical or moral coercion sufficient to overpower volition,

destroy free agency, and impel the grantor to act against the grantor's free will and inclination. *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976); *McPeak v McPeak (On Remand)*, 233 Mich App 483, 496; 593 NW2d 180 (1999); *In re Erickson Estate*, *supra*. A presumption of undue influence arises if evidence is presented that would demonstrate (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or the fiduciary's interest, benefits from the transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. *Kar*, *supra*; *In re Erickson Estate*, *supra*. Once the presumption is established, a "mandatory inference" of undue influence is created that shifts the burden of producing evidence that the transactions were free of undue influence to the proponents of the transactions. *Widmayer v Leonard*, 422 Mich 280, 288-291; 373 NW2d 538 (1985); *Kar*, *supra* at 541-542; *In re Leone Estate*, 168 Mich App 321, 325; 423 NW2d 652 (1988). However, the ultimate burden of persuasion remains with the contestant. *Widmayer*, *supra* at 290; *In re Leone Estate*, *supra*. Once evidence is introduced to rebut the presumption of undue influence, the permissible inferences of the presumption remain and may provide evidence sufficient to persuade the trier of fact that undue influence occurred. *Widmayer*, *supra* at 289-290.

In the present case, although respondent argues to the contrary, the probate court's findings of fact were not clearly erroneous such that this Court is left with a definite and firm conviction that a mistake was made. *In re Erickson Estate*, *supra*. The lower court record in this case supports the evidence cited by the court in its opinion and its findings of fact. The evidence presented was sufficient to establish a presumption of undue influence against respondent.

First, a confidential or fiduciary relationship existed between Maxine, the grantor, and respondent, a fiduciary. A fiduciary relationship is one based on confidence and trust by one person in the integrity and fidelity of another. *In re Leone Estate*, *supra* at 325. The evidence adduced at trial showed that Maxine suffered a severe stroke on May 7, 1990, and thereafter, lived with respondent and his wife, Della, from October, 1990, to December, 1994. As Maxine's son and caregiver, respondent was in a fiduciary relationship with Maxine. *In re Leone Estate*, *supra*. Moreover, a confidential and fiduciary relationship was legally established when Maxine executed a durable power of attorney to respondent in June of 1990 and when respondent assumed the duties of trustee for Maxine pursuant to the February, 1991 trust.

Second, petitioners established that respondent as a fiduciary benefited from the transactions. There is no dispute that respondent was to receive Maxine's real estate valued at approximately two million dollars as a result of the trust and the deeds being executed. Thus, the second condition is satisfied to establish a presumption of undue influence.

Third, petitioners have demonstrated also that respondent as the fiduciary had an opportunity to influence Maxine's decisions regarding her real estate. Maxine lived with respondent for over four years after her stroke and relied on respondent for her care. Respondent's attorney was also responsible for preparing the trust and the deeds conveying Maxine's property to respondent. Maxine did not retain independent counsel. Thus, the probate court properly concluded that the petitioners provided sufficient evidence to establish a presumption of undue influence.

With regard to whether respondent presented sufficient evidence to rebut the presumption of undue influence, we conclude that the probate court properly determined that “evidence had not been adduced in order to rebut the presumption.” First, the trial court properly considered the fact that Maxine had not retained independent counsel in preparing the trust and deed documents and that respondent’s attorney had prepared all the documents in question. *Kar, supra* at 543-544 (the defendant met his burden of rebutting the presumption of undue influence by establishing that the grantor sought out and retained independent counsel and that the grantor supplied the impetus behind the procurement of the deed); *The Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 273-274; 289 NW2d 898 (1980) (the absence of independent counsel at the time of execution of the trust is a primary factor in determining whether the grantor was subjected to undue influence).

Further, although respondent asserts that the probate court disregarded Maxine’s testimony that she was never tricked, threatened, or coerced by respondent or his wife, Della, regarding the real estate, this is not the case. The court specifically stated that it had examined Maxine’s testimony, but found, based on all the evidence presented at trial, that Maxine was in a weakened state of mind after her disabling stroke. The court’s finding regarding Maxine’s weakened state of mind was not clearly erroneous.

The court’s finding that Maxine was in a weakened state of mind is supported by Maxine’s confusing and inconsistent testimony. The court apparently found that Maxine’s testimony was incredible, and we will defer to the probate court regarding matters of credibility. *In re Erickson Estate, supra*. Although Maxine stated that she had given the real estate to respondent, she also indicated that she wanted the real estate divided among the children. Further, although Maxine denied ever telling her guardian ad litem or Dr. Shappell that she wanted her real estate divided equally among her children, both Dr. Shappell and the guardian ad litem testified that Maxine did make such statements. In addition, Dr. Shappell testified that Maxine was incapable of making informed decisions regarding her finances and that, even before she had a stroke, she had a dependent personality disorder that made her vulnerable to being influenced. Further, Dr. Shappell found Maxine to be legally and mentally incompetent as of February, 1996, and stated that there was about a ninety percent chance that Maxine was legally incapacitated in February, 1991, and December, 1993, when she executed the trust and the deeds. Dr. Shappell also testified that Maxine was suffering from dementia after her stroke on May 7, 1990, including when she executed the trust and deeds in February, 1991, and when she executed the deeds in December, 1993. Thus, the trial court did not clearly err in finding that respondent had failed to produce sufficient evidence to rebut the presumption of undue influence. The probate court properly determined that respondent unduly influenced Maxine.

Next, respondent asserts that the trial court erred in denying his motion for summary disposition on petitioners’ request to set aside the transfer of real estate from Maxine to respondent because petitioners lacked standing. We disagree. This Court reviews de novo the probate court’s denial of summary disposition pursuant to MCR 2.116(C)(5) (party asserting the claim lacks the legal capacity to sue). *Wortelboer v Benzie Co*, 212 Mich App 208, 213; 537 NW2d 603 (1995). The entire record must be examined to determine whether the moving party is entitled to judgment as a matter of law. *Id.*

After reviewing the record, we conclude that the trial court did not err in denying respondent's motion for summary disposition because petitioners have shown that they have a substantial and personal interest in the outcome of this case. *Altman v Nelson*, 197 Mich App 467, 475; 495 NW2d 826 (1992). Petitioners are Maxine's children who allege that respondent, their brother, unduly influenced Maxine to create a trust and transfer all her prime real estate to that trust. The trust provided that upon termination of the trust, which would occur upon the death of Maxine or upon Maxine being absent from respondent's home for more than ninety days, all of the trust assets would be transferred to respondent. As petitioners logically and plainly stated in their appellate brief, they have a substantial and personal stake in the outcome of this action because a determination that the trust is invalid as a result of undue influence would result in the real estate being returned to the ownership of Maxine, and petitioners could be entitled to a share of Maxine's assets in the event of her death. Petitioners have demonstrated that their interests will be detrimentally affected in a manner different from the citizenry at large. *House Speaker v State Administrative Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993).

Further, while respondent argues that only Maxine (or her conservator) would have standing to assert the claim of undue influence, respondent does not cite any authority to support his claim. As logically argued by petitioners, if they had no standing as Maxine's children to bring the present claim, a wrongdoer who has exercised undue influence would likely be rewarded because the transactions may go unchallenged. We agree with petitioners' statement that this Court should not adopt a rule of standing that may assist those persons who exercise undue influence for their own financial gain.

On cross-appeal, petitioners alternatively argue that if this Court reverses the probate court's judgment in favor of petitioners, then this Court should consider petitioners' argument that the trial court abused its discretion in refusing to disqualify attorneys Wyss and Lewis from representing both respondent and Maxine. Because we have determined that the probate court properly entered judgment in favor of petitioners, this Court need not address this issue.

We affirm.

/s/ Jane E. Markey
/s/ Martin M. Doctoroff
/s/ William B. Murphy